

DELTA PROTECTION COMMISSION

14215 RIVER ROAD

P.O. BOX 530

WALNUT GROVE, CA 95690

PHONE: (916) 776-2290

FAX: (916) 776-2293

DRAFT

MINUTES OF THE AUGUST 24, 1995 MEETING OF THE
DELTA PROTECTION COMMISSION1. Call to Order/Roll Call.

The meeting was called to order at 7:30 p.m. Present were Commissioners: Broddrick, Calone, Curry, Ferreira, Freeman, McCarty, Mello, Murphy, Nottoli, Potter, Salmon, Sekelsky, Simas, Torlakson and Yates. Absent were Commissioners: Fargo, Hill, McGowan and Thomson.

Dr. Ernst addressed the Commission stating there was no public comment period on the agenda; Ms Aramburu apologized stating that was an oversight. Dr. Ernst noted there were not many representatives of cities or counties present at the meeting.

2. Minutes of July 27, 1995 Meeting.

Commissioner Potter corrected page 12 to read "San Joaquin River Management Council".

Commissioner Torlakson asked that his full, amended motion regarding the San Luis Drain resolution be included in the minutes, as shown on the hand-out he distributed.

Commissioner Torlakson moved adoption of the minutes, as amended; the motion was seconded by Commissioner Murphy. The motion was approved by a voice vote.

3. Chairman's Report.

Chairman McCarty noted upcoming Delta events. He reported he had attended the August 16, 1995 meeting of the Bay Delta Advisory Committee (BDAC).

4. Report from Levees Subcommittee.

Ms Aramburu reported the Levee Subcommittee recommended that the Chairman send a letter to Office of Emergency Services (OES) supporting timely issuance of approved claims and payment of the full claims from the 1982, 1983 and 1986 floods; DWR has offered to provide staffing to assist in the claim processing; the Subcommittee will bring to the full Commission a position letter suggesting the Commission take a "point" position on developing a program for funding levee maintenance; the Corps indicated a policy letter has been approved stating that all work up to PL-99

standards would be allowed as maintenance under Nationwide Permit 3 (NWP 3), and General Permit 14 (GP 14) will be reissued in mid-September. She noted the extensive work by DWR and DFG staff in this process. The Subcommittee received a report on Corps planning programs and learned that dredging and riprap projects will be on-going.

Chairman McCarty added that he had been directed to send a letter encouraging the Corps to continue to participate in Delta issues and projects, to send a letter encouraging study of the use of Bay dredging materials for the Delta levee maintenance, and letters of thanks to those involved in permit issuance.

Commissioner Broddrick noted that DFG administering GP 14 is subject to Secretary Wheeler's approval and would only be in the Delta.

5. Attorney General's Report.

Richard Frank made a presentation on the Babbitt v. Sweet Home Supreme Court decision of two months ago, using overheads. The case deals with the scope of the federal Endangered Species Act (ESA) and the restriction of the ESA upon private conduct and private lands. He started with Section 9 of the ESA, which states it is unlawful to "take" any threatened or endangered species.

He said the ESA defines "take" in a broad manner, including the term "harm"; "harm" is undefined. A 1975 regulation defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife". This definition has been used to protect the Spotted owl and Delta smelt. A facial challenge of the regulation was filed, stating the definition of "harm" is a misreading and excessively broad reading of the ESA. The suit is important because biologists state that loss of habitat leads to loss of species and because the ESA has been used as a land use control, having a pronounced impact on privately-owned lands.

On June 29, 1995, the Supreme Court upheld the regulation on a 6 to 3 vote. On its face, the regulation is appropriate and legally sufficient.

The issue could still be lost in Congress through battles over the budget and the ESA is up for reauthorization and "harm" could be redefined.

In California law, the word "take" does not include "harm", only direct and active actions. The Attorney General concluded in a May 15, 1995 opinion, the State ESA does not prohibit indirect harm through removal of habitat.

Commissioner Broddrick underlined that the State and federal laws are different, but noted that under the California Environmental Quality Act (CEQA), identification of an impact to an endangered species results in a mandatory finding of significance.

6. Executive Director's Report.

Ms Aramburu reviewed the materials in the mailing packet. She noted she had passed out at the meeting a memo regarding problems in the Delta identified at the first CalFed workshop.

Steve Yeager of the CalFed urged interested persons to get on the mailing list.

Ms Aramburu noted an error in the Plan; Bethel Island is shown in the Primary Zone; it is not. She reported on a meeting with Ducks Unlimited and their agreement to work with the Commission on future grant problems. She noted settlement of a suit which will result of cleanup of the Penn Mine and "Baykeeper" type program to monitor the Delta. She reviewed the memo regarding status of local government submittals.

7. Pending Projects Memo.

There were no questions or comments.

8. High Waters.

Ms Aramburu reviewed the staff report dated August 11 summarizing her meeting with the Coast Guard and the Department of Boating and Waterways. A copy of her letter dated May 25 was attached. At the meeting the Coast Guard indicated they are not interested in regulating recreational vessels and felt that activity should be left to local governments. Coast Guard said they would be willing to assist. There were two events that resulted in local governments restricted activities: Sacramento County acted after the Folsom Dam spillway broke, and San Joaquin County restricted boating on a portion of the Mokelumne River due to high waters.

Commissioner Mello said it was easy to control boating on the Mokelumne because there is very limited access to the waterway.

Commissioner Broddrick noted that the Folsom event was unscheduled and the Sheriff could act independently to protect public safety; on the Mokelumne, that was a predicted situation and there was time for the Board of Supervisors to act, and directed the Sheriff to enforce the closure. In both situations the County acted; the challenge is in the enforcement.

Chairman McCarty called for public comment; there was none.

Commissioner Curry said Department of Boating and Water agreed that this is a matter best left to the cities and counties.

Commissioner Salmon suggested that the Commission inform the local government about the staff findings.

Commissioner Nottoli agreed with Commissioner Salmon.

Commissioner Mello said the problem is in enforcement.

Chairman McCarty agreed that enforcement is the challenge; he said if there is another wet year it will be a problem. He agreed that the Commission should share its findings with local government and urge preparation of an action plan.

Commissioner Salmon agreed, even though he noted that the local governments complain about lack of funding.

Chairman McCarty suggested a letter be sent to the local governments of the findings and information about the procedures and processes that are existing, offer to work with local governments if they want assistance.

On a motion by Commissioner Torlakson and a second by Commissioner Calone; the suggestion was approved by voice vote.

9. Future of the Commission.

Ms Aramburu reviewed the history of the legislation which created the Commission, the charges of the Act, and the actions the Commission is mandated to carry out. She noted she had included in the staff report the Plan policies about implementing the legislation. Also in the report were memos about long-term funding sources.

Commissioner Murphy asked why the legislation included a sunset date.

Chairman McCarty said it was a negotiated condition of the legislation.

Commissioner Murphy asked if there was a specific reason for the sunset, e.g. once the Commission completed certain tasks it could sunset. He said it would help to know when considering if the Commission should continue.

Commission Potter said he recalled that once the Plan was adopted and in place, the appeal authority and Plan oversight could be carried out by a smaller body, however he noted he was not sure if he recalled correctly.

Commissioner Mello said that the North Delta Water Agency had originally believed that the Commission would adopt a plan, have the plan adopted by the Counties and then sunset. If the Commission would continue, it would be as an appellate body only.

Chairman McCarty asked for public comments; there were none.

Chairman McCarty said there were several ways to approach the issue: should the Commission continue; if yes, should its goals and objectives change, should the boundary of the Primary Zone change, should there be time specific extensions, should there be time extensions to meet certain goals, and how should the Commission be funded. If the Commission is not to continue, how should the Commission's tasks re: the Plan oversight and appeals be assigned. He said he supported appointing a Subcommittee to review the issues and to bring recommendations to the full Commission.

Commissioner Mello said the need for the Commission depends on how the Counties amend their General Plans.

Chairman McCarty noted the pending deadline and the need to forward suggestions to the Legislature by December of 1995.

Commissioner Mello suggested extending the Commission for only a year or two.

Commissioner Broddrick supports the Subcommittee approach. He said its important to hear from the community about the need for the Commission. He suggested a series of meetings/public hearings to gather input.

Chairman McCarty agreed and suggested holding meetings of the Commission in different locations to receive input.

Commissioner Nottoli supported holding meetings in different parts of the Delta for public input and to distribute the Plan itself.

Commissioner Potter suggested creating a Subcommittee to hold meetings in the Delta to receive input on the future of the Commission.

Commissioner Murphy moved Commissioner Potter's suggestion: create a Subcommittee and direct the Subcommittee to hold hearings, formulate recommendations, and bring recommendations to the full Commission; seconded by Commissioner Mello.

Chairman McCarty asked for volunteers for the Subcommittee: Commissioners Mello and Sekelsky volunteered. Ms Aramburu suggested she would contact the County supervisors to find a suitable site. Chairman McCarty suggested holding the Commission meetings in different locations.

Commissioner Potter asked that the Counties each discuss the future of the Act and the Commission and comment to the Commission.

Commissioner Simas suggested that staff make a presentation for each Board of Supervisors; Commissioner Nottoli agreed.

10. Commissioner Comments.

Commissioner Murphy thanked Commissioner Mello for the corn.

Commissioner Curry said businesses in Contra Costa County is developing a warning system to protect citizens in case of a disastrous event. He suggested that staff invite a speaker to explain the program to the Commission; the program affects the western Delta.

Commissioner Mello asked why the warning system doesn't include downwind areas.

Commissioner Nottoli said the Rancho Seco plant had a similar warning system; that system could be used as a model for Contra Costa's system.

Chairman McCarty asked Ms Aramburu to follow up on Commissioner Curry's suggestion.

11. Adjournment.

The meeting was adjourned at 8:35 p.m.